Georgetown Environmental Law and Policy Institute's
Takings-Net

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Takings Snapshots, Volume 92, December 12, 2008

To provide timely information about regulatory takings litigation, the Georgetown Environmental Law & Policy Institute provides brief summaries of recently issued decisions and other important case developments. Past snapshots are collected on the GELPI website (http://www.law.georgetown.edu/gelpi). As in the past, the cases are organized in rough order of their importance and interest value.

1. Casitas Municipal Water District v. United States, 2008 WL 4349234 (Fed. Cir., Sept. 25, 2008) (in a dramatically novel decision, the U.S. Court of Appeals for the Federal Circuit, reversing the U.S. Court of Federal Claims, ruled 2 to 1 that a requirement under the Endangered Species Act that a dam operator divert a portion of its state appropriative water right to operate a fish ladder resulted in a per se taking under a "physical appropriation" theory; the panel decision is in serious tension with a long line of precedents rejecting takings claims based on fish passage requirements as well as modern takings precedents (including Tahoe-Sierra and Lingle) emphasizing the narrowness of the per se takings categories; Judge Mayer, the former Chief Judge of the Federal Circuit, dissented, argued that the taking claim should be analyzed under the Penn Central framework, in which case, as plaintiff conceded, the claim would fail because the regulation imposed only a very modest economic burden on the plaintiff; one irony is that the claims court judge handling this case, John Wiese, previously issued a decision in the Tulare Lake case, holding that a regulatory restriction on water use represented a per se taking, but rejected the per se theory in this case and repudiated his reasoning in Tulare Lake; on December 10, 2008, the United States filed a petition for rehearing and/or rehearing en banc in this case).

2. OFP, L.L.C. v. State, see New Jersey Supreme Court website (N.J., Dec. 9, 2008) (the New Jersey Supreme Court gave land protection efforts in New Jersey a major boost with a decision affirming, "substantially" for the reasons stated by the N.J. Appellate Division, the Appellate Division's 2007 decision dismissing a taking claim based on the N.J. Highlands Water Protection and Planning Act; the Appellate Division (see Takings Net, Volume 87, November 7, 2007) ruled that a developer's claim based on the Act's land use restrictions was not ripe because the plaintiff had not attempted to invoke the Act's hardship waiver process for allegedly burdensome regulations; the Appellate Division also ruled that the fact that New Jersey officials were behind schedule in putting in place the transfer of development rights program called for by the Highlands Act did not excuse the plaintiff's failure to seek a hardship waiver) (GELPI and others filed an amicus brief in the New Jersey Supreme Court on behalf of the New Jersey Highlands Coalition urging affirmance of the Appellate Division decision; the brief is available on the GELPI website at http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Briefs_NJHighlands.pdf).

3. Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 2008 WL 4979930 (9th Cir., Nov. 2008) (in a development that only true takings mavens could appreciate, the U.S. Court of Appeals for the Ninth Circuit, in response to an application for rehearing filed by the

County of San Luis Obispo, withdrew its prior opinion issued September 17, 2007 (see Takings Net, Volume 87, Nov., 7, 2007), and issued a new opinion; in the earlier opinion the Court ruled that the plaintiff's as applied taking claim based on a mobile home rent control ordinance was not ripe because the plaintiff had not pursued available state compensation remedies, and that plaintiff's facial taking claim was barred by the applicable statute of limitation; in the novel part of that decision, the panel ruled that in a facial case the statute of limitations "restarts" with each transfer of the property to a new owner, but that this claim was still time-barred based on the facts of the case; on rehearing, the panel reached the same *result* but based on different *reasoning*, adopting the view that, based on prior Ninth Circuit precedent, the statute of limitations for a facial taking claim starts to run when the law is first adopted, and does *not* restart with each subsequent transfer of the property to a new owner; based on this new reasoning, the claim was even more time barred than the panel had previously ruled) (GELPI, together with Andrew Schwartz of Shute, Mihaly & Weinberger, filed an amicus brief in support of the County on behalf of the League of California League of Cities and the California State Association of Counties, which is available on the GELPI website at http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Briefs_Equity.pdf).

4. McClung v. City of Sumner, 545 F.3d 803 (9th Cir., Sept. 25, 2008) (in a significant decision addressing the scope of Nollan/Dolan, the U.S. Court of Appeals for the Ninth Circuit ruled that the Penn Central framework, rather than the more demanding Nollan/Dolan tests, governed an alleged taking claim against a city based on a condition imposed on all new developments requiring that property owners install 12-inch storm drains; the Court ruled that the Nollan/Dolan tests do not apply to generally applicable development conditions that do not require an owner to relinquish rights in real property); but see 2008 WL 5049647 (Dec. 1, 2008) (order, filed in response to a petition for rehearing, amending the earlier opinion by adding a footnote observing that the 12-inch pipe requirement was adopted to mitigate the adverse effects of development on the community and stating that the Court was not deciding wither the Penn Central framework or the Nollan/Dolan tests would apply to a legislatively imposed exaction "designed to advance a wholly unrelated interest").

5. Monks v. City of Rancho Palos Verdes, 84 Cal.Rptr.3d 75 (Cal.App., Oct. 1, 2008) (in a striking decision, the California Court of Appeals, reversing a lower court decision, ruled that a property owner established a Lucas taking based on a city moratorium on residential development in a landslide-prone area; the Court rejected the city's nuisance defense, stating that the city failed to carry its burden of proving that development in this area would amount to a nuisance, stating "A permanent ban on home construction cannot be based merely on a fear of personal injury or significant property damage").

6. Citizens for Constitutional Fairness v. Jackson County, No. 08-3015-PA (D.Or., Nov. 12, 2008) (in a surprising development following the adoption of Oregon Measure 49, through which the state's voters had appeared to at least temporarily put the property rights issue to bed in the state, the Federal District for Oregon, following a full trial, concluded that previous Measure 37 waivers issued by Oregon municipalities constitute contracts between the property owners and the municipalities and that Measure 49, insofar as it modified the rights available to Measure 37 claimants, resulted in a violation of the federal Contracts Clause; unless reversed on appeal, the

ruling will mean that pre-Measure 49 waivers issued pursuant to Measures 37 remain fully enforceable by property owners, notwithstanding the adoption of Measure 49).

7. Wolf Ranch, LLC v. City of Colorado Springs, 2008 WL 4878388 (Colo.App. , Nov. 13, 2008) (in a significant decision interpreting Colorado's 1999 Regulatory Impairment of Property Rights Act, which was designed to extend the Nollan/Dolan tests to monetary exactions (while preserving the distinction between adjudicative and legislative exactions), the Colorado Court of Appeals ruled that the Act was not triggered by an assessment of per acre drainage fees on a major development project, because the fees were not set on an individual and discretionary basis, but rather were set pursuant to a formula established in a municipal ordinance).

8. Interstate Companies Inc. v. City of Bloomington, No. 27-CV-08-4661 (Minn.Dist.Ct., Aug. 25, 2008) (in an airport zoning case, the Minnesota District Court, discussing and explicitly declining to follow the Nevada Supreme Court's controversial Sisolak decision (see Takings Net, Vol. 81, Aug. 30, 2006), granted judgment to the city of Bloomington and the Metropolitan Airport Commission on a landowner's claim that the defendants effected a per se taking by restricting development on its property adjacent to a public airport to a height of 60 feet; the Court also rejected plaintiff's Penn Central claims on the ground that they were not ripe because of the lack of a final decision and, to the extent they were based on federal law, because plaintiff had not exhausted available state compensation remedies).

9. Acceptance Insurance Companies, Inc. v. United States, 84 Fed. Cl. 111 (Sept. 25, 2008) (in an interesting case involving the application of the Takings Clause to private contracts, the U.S. Court of Federal Claims rejected a taking claim based on the actions of the Risk Management Agency within the U.S. Department of Agriculture blocking plaintiff's planned sale of a "book" of crop insurance business to another company, ruling that (1) plaintiff lacked a sufficient property interest in the business to support a taking claim because (a) plaintiff's interest in selling the book of business pursuant to a letter of intent was a mere "collateral interest" in property, and (b) plaintiff's alleged property interest was entirely dependent upon the elaborate regulatory program governing crop insurance, and (2) in any event, plaintiff's taking claim failed under the Supreme Court's Omnia decision ruling that government action defeating an expectancy under a private-private contract cannot give rise to a viable taking claim).

10. Vanek v. State of Alaska, 193 P.3rd 283 (Alaska, Sept. 19, 2008) (in an important natural resources case, the Alaska Supreme Court, affirming a trial court ruling, rejected takings claims by salmon fishermen based on state regulations restricting the period during which fishermen could catch salmon; the Court rejected the alleged taking of fishing permits on the ground that the permits did not constitute property interests, given that the governing legislation and applicable regulations made clear that the permits were not intended to create property interests and because treating these permits as a property interest would be inconsistent with Alaska's constitutional provision preserving common public uses of the state's waters; the Court also rejected the claim based on the alleged taking of shore leases, on the ground that the leases covered only submerged lands and not the fisheries, and the leases specifically reserved the public's authority to regulate fishing activity).

11. Walton County v. Stop Beach Renourishment, Inc., 2008 WL 4381126 (Fl., Sept. 29, 2008) (in a decision with implications for public efforts to adapt to sea level rise due to global warming, the Florida Supreme Court, in a 5 to 2 decision, reversed the Florida Court of Appeals and rejected a taking claim based on the Florida Beach and Shore Preservation Act, which authorizes the state to nourish beachfront areas with sand and assert public ownership of the created land area; the Court ruled that the Act did not result in a taking because it did not fundamentally interfere with littoral owners' common law rights to use and gain access to the water).

12. Johnson v. American Leather Specialties Corp., 578 F.Supp2d. 1154 (N.D.Iowa, Sept. 29, 2008) (the federal District Court for the Northern District of Iowa granted in part motions for summary judgment filed by a retailer and by a distributor of a dog leash that allegedly caused injury to the plaintiff, ruling that the defendants were entitled to judgment as a matter of law under an Iowa tort reform statute barring strict liability and implied warranty claims against these types of defendants; the Court rejected plaintiff's argument that the Iowa tort reform statute effected a Fifth Amendment taking, ruling that plaintiff lacked a property interest in the former common law liability rules and, in any event, abrogation of the prior common law rules did not constitute a taking under Penn Central on the facts of this case).

13. Mead v. City of Cotati, 2008 WL 4963048 (N.D.Ca, Nov. 19, 2008) (in a well-reasoned and thoughtful opinion discussing all the relevant authorities, the federal District Court for the Northern District of California dismissed claims against the U.S. Fish and Wildlife Service and a California city seeking declaratory and injunctive relief on the theory that a development permit effected a taking by imposing an affordable housing requirement on the developer and requiring the developer to mitigate adverse effects of development on endangered species habitat; the Court ruled that it lacked subject matter jurisdiction over the claim against the United States because a claim for declaratory and injunctive relief is unavailable when a claim for compensation under the Takings Clause can be brought in the U.S. Court of Federal Claims, the Court also ruled, for essentially the same reason, that a suit for declaratory and injunctive relief would not lie against local government in federal Court where a claim for monetary compensation could be brought in state court).

14. Franklin Memorial Hosp. v. Harvey, 2008 WL 4416412 (D.Me., Sept. 24, 2008) (in another well-reasoned decision, a federal magistrate in Maine recommended rejection of a taking claim by a non-profit hospital objecting to a state law requiring hospitals to provide free medical services to the poor; the magistrate rejected application of a per se test, because the hospital had voluntarily opened its doors to the public and the law simply regulated the financial terms of medical services; the magistrate also rejected the claim under Penn Central, largely on the basis that the economic impact of the law was relatively modest, especially when viewed together with the impacts of other government programs providing positive economic benefits to the hospital).

15. Berry v. Volunteers of America, Inc., 2008 WL 4255241 (La.App., Sept. 16, 2008) (reversing a trial court's rejection of a taking claim based on a one-year development moratorium, the Louisiana Court of Appeals ruled that the claim that the moratorium constituted a taking because it was adopted in bad faith was ripe for adjudication).

16. Aasmundstad v. State of North Dakota, 2008 WL 4925870 (N.D., Nov. 19, 2008) (in a case raising the relatively rare issue of proximate causation in an inverse condemnation action, the Supreme Court of North Dakota, conducting a deferential review of trial court findings, upheld the trial court's rulings that (1) various government water projects were not a "substantial cause" of the flooding of plaintiffs' lands, and (2) that an act of God, i.e., excessive precipitation, was the proximate cause of the flooding, supporting the conclusion that plaintiffs' inverse condemnation claims were properly dismissed; the Court ruled that because the plaintiffs had embraced the "substantial cause" standard before the trial court, they were barred from arguing for a more expansive theory of proximate causation on appeal).

17. Guilebau v. Parish of St. Landry, 2008 WL 4948836 (W.D.La., Nov. 19, 2008) (in an only-in-Louisiana-type case, the federal District Court for the Western District of Louisiana dismissed a claim that a parish had effected a taking of plaintiff's 17-year-old judgment arising from a successful tort suit against the parish by never paying the judgment; the Court ruled that the claim failed because, even though the judgment created an obligation on the part of the parish to pay money, it did not create any duty to honor the obligation at any particular point in time).

18. Clifton v. Village of Blanchester, 2008 WL 4058098 (Ohio App., Sept. 2, 2008) (in a novel and problematic ruling, the Court of Appeals of Ohio, reversing the trial court's dismissal of a taking claim, ruled that a property owner presented a viable Penn Central claim based on the theory that the village's rezoning of adjacent property to permit more intensive industrial uses reduced the value of the claimant's property to such an extent that the rezoning amounted to a taking; query whether the plaintiff has a protected property interest in the zoning applicable to adjacent property sufficient to support a taking claim).

19. Black v. United States, 84 Fed.Cl. 439 (Oct. 23, 2008) (the U.S. Court of Federal Claims dismissed a taking claim based on the Securities and Exchange Commission's prosecution of criminal and civil proceedings against the plaintiff based on allegedly inaccurate assessments of the market value of certain of plaintiff's investment contracts, ruling that (1) the claim was barred by the applicable six-year statute of limitations, (2) a plaintiff may not rely on a takings theory to collaterally attack findings made in other judicial proceedings in which the plaintiff was involved, (3) a plaintiff may not base a taking claim on the alleged invalidity of government action, and (4) claims of due process violations and of tortious conduct are outside the jurisdiction of the U.S. Court of Federal Claims).

20. Janky v. Batistatos, 2008 WL 4411504 (N.D.Ind., Sept. 25, 2008) (in a takings suit filed against a county convention bureau and various government officials, after the plaintiff had already prosecuted a successful copyright infringement against the bureau and other defendants based on the use of one of plaintiff's songs without permission, the federal District Court for the Northern District of Indiana ruled that (1) insofar as plaintiff claimed a taking based on the use of her song, the claim was barred by res judicata because the claim exactly overlapped with plaintiff's copyright infringement claim, (2) insofar as plaintiff claimed a taking based on the bureau's alleged assertion of frivolous defenses in the copyright infringement suit, the claim (a) was barred by collateral estoppel because the judge handling the copyright suit denied that the defenses were frivolous, and (b) the assertion of legal defenses in a judicial proceeding cannot provide the basis for a valid taking claim, and (3) the claim had to be dismissed under

Williamson County because the plaintiff had not pursued available state compensation remedies).

21. Jarvis Associates, LLC v. Charter Township of Ypsilanti, 2008 WL 5003022 (Mich.App., Nov. 25, 2008) (unpublished decision) (affirming a trial court ruling, the Michigan Court of Appeals ruled that a township was entitled to summary judgment on a claim that it effected a taking by denying an owner's application for rezoning of a property from light industrial use to general business; the Court first concluded that the relevant parcel did not consist of the 9.5 acres for which plaintiff sought rezoning, but rather should be defined in terms of plaintiff's entire 30-acre parcel, which consisted of two 15-acre properties that plaintiff had purchased at different times but that were contiguous and subject to the same zoning classification; then, applying the Penn Central factors, the Court ruled that the character factor weighed in favor of the government given that the case involved a regulatory use restriction that created a significant degree of reciprocity of advantage, the economic impact (specifically, a 61% reduction in value), though "substantial," was not sufficient by itself to establish a taking, and (3) the investment expectations factor weighed in favor of the township because the plaintiff purchased the property with notice of the existing light industrial zoning classification).

22. Hendee v. Township of Putnam, 2008 WL 3979446 (Mich. App., Aug. 26, 2008) (unpublished decision) (reversing a trial court decision, and after ruling that plaintiff's as applied taking claim based on a ten-acre minimum zoning ordinance was ripe because seeking further review would have been futile, the Michigan Court of Appeals rejected the takings claim on the merits, stating, "Given all the enumerated permitted uses in an A-O zoning district and uses that could be pursued on obtaining a special use permit, which were not explored or developed at trial, and considering the historical use and zoning of the property and that nearly half the acreage could be used for farming crops as evidenced by testimony regarding the leasing of the property for such a purpose, there was simply a failure to establish a regulatory taking;" one member of the panel dissented, arguing that the futility exception to ripeness doctrine did not apply in this case, because the plaintiff had not filed a formal application for its proposed use of the property).

23. Universal Outdoor, Inc. v. Tennessee Dept. of Transportation, 2008 WL 4367555 (Tenn.Ct.App., Sept. 24, 2008) (the Tennessee Court of Appeals affirmed a trial court decision affirming a state agency's refusal to allow a billboard operator to construct a new billboard after being required to remove a grandfathered billboard from a nearby location on the same parcel of land to accommodate a planned highway extension; the Court ruled that any claim plaintiff had to compensation for a taking of its interest in the billboard should have been brought in an independent lawsuit and that the taking issue could not be raised as a challenge to the validity to the agency's decision barring construction of the new billboard).

24. Pearson v. City of Louisville, 2008 WL 4814051 (N.D. Miss., Nov. 4, 2008) (in a dramatic little case, brought by a property owner whose properties were declared a nuisance and then bulldozed by city officials, the federal District Court for the Northern District of Mississippi ruled that the federal taking claim was not ripe because the plaintiff had not availed himself of state compensation remedies and the taking claim under the Mississippi Constitution had to be dismissed because elimination of a public nuisance cannot constitute a taking).

25. Dibble Edge Partners, LLC v. Town of Wallingford, 2008 WL 4038946 (Conn.Super., Aug. 6, 2008) (unpublished decision) (in a complicated dispute about whether the owner of a landlocked property was entitled to gain access to a public road via an easement across the property of a neighbor, the Court denied cross motions for summary judgment and remanded the case for trial; the Court reached the interesting legal conclusion that a regulation mandating that a property owner seeking subdivision approval provide roadway access for neighboring properties created a property right which the plaintiff in this case could rely upon in alleging that failure to provide such access constituted a taking; the Court also dismissed the federal taking claim on ripeness and justiciability grounds on the theory that the prosecution of the state inverse condemnation claim precluded simultaneous prosecution of the federal taking claim; query whether this ruling is consistent with the U.S. Supreme Court's San Remo Hotel decision).

26. Freeman v. United States, 83 Fed.Cl. 536 (Aug. 28, 2008) (in a case involving a striking example of government administrative sloth, the U.S Court of Federal Claims declined a motion by a takings claimant, who had originally filed a taking claim based on alleged denial of access to his vested mining claims, for reimbursement of the over $100,000 plaintiff had spent to maintain his claims while the action was stayed pending a determination by the U.S. Department of Interior as to the validity of plaintiff's mining claims; the Court ruled that maintenance fees were legally mandated and it would be "inefficient" to suspend the fees; however, the Court raised the question of whether the 7-year stay of proceedings had gone on too long and threatened to lift the stay if the Interior Department did not resolve the validity issue expeditiously).

27. City of Dallas v. Chicory Court Simpson Stuart, L.P., 2008 WL 4966893 (Tex.App., Nov. 24, 2004) (in an interlocutory appeal from the trial court, the Texas Court of Appeals rejected on ripeness grounds a taking claim by a developer based on a requirement to build a large storm drain across its property to accommodate run off from a neighboring property; the Court ruled that the plaintiff's claim was not ripe because plaintiff had not sought a variance from local officials for their proposal to build a different storm water drainage system; the court also dismissed a federal takings claim on ripeness grounds, reasoning that the plaintiff's failure to pursue a ripe state taking claim rendered its federal taking claim "permanently unripe" as well).

28. Wolverine Commerce, LLC v. Pittsfield Charter Township, 2008 WL 4958785 (Mich.App., Nov. 20, 2008) (reversing a trial court's finding of a taking, the Court of Appeals of Michigan rejected a taking claim based on a township's refusal to rezone property from commercial business park to residential, both because the current zoning classification was not completely arbitrary and because the burden imposed by the zoning ordinance was "self-inflicted" in the sense that it was the plaintiff who previously persuaded the township to put the property in a commercial business park classification).

29. Karwosky v. Granger Township Trustees, 2008 WL 4377438 (Ohio App., Sept. 29, 2008) (affirming a trial court ruling, the Ohio Court of Appeals rejected a taking claim based on a township's change in a property's zoning classification from commercial to residential; the Court questioned whether the "substantially advance" inquiry in Ohio takings law would survive the U.S. Supreme Court's Lingle decision but concluded that, even if the substantially-advance test

still governed, the taking claim failed because the zoning change was made through an entirely lawful process; the Court also rejected the taking claim because the plaintiff sold the property after the zoning change for $305,000, conclusively demonstrating that he was not denied all economically viable use of the property).

30. Ruff v. County of Kings, 2008 WL 4287638 (E.D.Ca., Sept. 17, 2008) (the federal District court for the Eastern District of California rejected a taking claim based on (1) adoption of a general plan amendment that required plaintiff's property to be annexed to an urban area before it could be used for a commercial recycling facility and (2) the County's alleged delay in processing plaintiff's application until the general plan amendment was in place; the Court ruled that the taking claim based on the general plan amendment was not ripe because the plaintiff had not pursued available state compensation remedies, and the taking claim based on the alleged delay failed on the merits because mere procedural delay in acting on an application cannot provide the basis for a taking claim).

31. Doorenbos v. Alpine Township, 2008 WL 4604059 (Mich.App., Oct. 16, 2008) (unpublished decision) (affirming a trial court's grant of summary judgment to a Michigan Township, the Michigan Court of Appeals rejected a claim that the government effected a taking under Penn Central by delaying approval of plaintiff's application for rezoning of its property from agricultural to residential for over four years; the Court emphasized the difficulty of establishing a temporary taking under Penn Central, observing that "including the temporal factor in the balancing test renders it a rare case indeed where a temporary regulation that does not deny all use of the property triggers the constitutional requirement of just compensation;" the Court also observed that the comprehensiveness of the township's zoning ordinance weighed in favor of the defendant and that Tahoe-Sierra established that mere fluctuations in property value during the process of government decision-making cannot support a viable taking claim).

32. Consumers Energy Co. v. United States, 84 Fed. Cls. 152 (Sept. 30, 2008) (in a case involving the interplay between takings and contract claims against the United States, arising from the United States' alleged failure to dispose of spent nuclear fuel as required by the Nuclear Waste Policy Act of 1983, the U.S. Court of Federal Claims, after ruling that the United States was liable for a breach of contract, dismissed the plaintiff's taking claim, both insofar as it rested on alleged taking of contract rights and on an alleged taking of plaintiff's real property interests that were being devoted to the storage of the waste).

33. Winters v. Lakeside Joint School Dist., 2008 WL 4937812 (N.D.Cal., Nov. 17, 2008) (the federal District Court for the Northern District of California dismissed on ripeness grounds a taking claim based on the theory that a city reduced the value of houses in the community by contracting for its middle school students to attend school in a new, supposedly inferior school district, because plaintiffs had failed to pursue available state compensation remedies).

34. Forest Glade Management, LLC v. City of Hot Springs, 2008 WL 4876230 (Ark.App., Nov. 12, 2008) (affirming a trial court judgment, the Court of Appeals of Arkansas rejected a taking claim based on a city ordinance requiring that mobile homes placed in the city after the adoption of the ordinance be constructed after a certain date, reasoning that allegations of lost profits were insufficient to establish that the owner of a mobile home park had suffered any

reduction in the value of its property, much less a reduction that would rise to the level of a constitutional taking).

35. Baker v. St. Bernard Parish Council, 2008 WL 3876282 (E.D. La., Aug. 18, 2008) (in another Louisiana takings case, the federal District Court for the Eastern District of Louisiana rejected a taking claim against St. Bernard Parish based on an ordinance requiring property owners to obtain permits before renting a single-family residence, ruling that the suit did not satisfy the first prong of the Williamson County ripeness test (because the plaintiffs had not actually filed an application for a permit) or the second prong of the Williamson County test (because they had not pursued available state compensation procedures)).

36. Nasca v. Town of Brookhaven, 2008 WL 4426906 (E.D.N.Y., Sept. 25, 2008) (the federal District Court for the Eastern District of New York granted summary judgment to a Long Island town on a claim that the owner suffered a Penn Central taking based on a law requiring a permit to rent residential properties, reasoning that the permitting requirement had little if any adverse affect on the value of the property).

37. Meredith v. City of Lincoln, 2008 WL 4937809 (D.Or., Nov. 6, 2008) (the federal District Court for the District of Oregon rejected a taking claim based on a city's denial of a permit to an owner of a billboard seeking to install an electronic flashing sign on the billboard; the Court ruled that the permit denial did not result in a taking because "plaintiff fails to establish that the denial cause more than a 'negligible' economic impact, or interfered with 'distinct investment backed expectations'").

38. Briseno v. United States, 83 Fed. Cl. 630 (Sept. 18, 2008) (in a suit brought by a neighbor of a unit of the National Forest system in New Mexico, the U.S. Court of Federal Claims declined to grant the government's motion to dismiss a taking claim alleging that Forest Service employees, as part of thinning operation, had trespassed on plaintiffs' property and cut over 100 of their trees; the Court ruled that the plaintiffs had sufficiently alleged a potential taking to survive a motion to dismiss challenging the Court's jurisdiction, but stated that it remained to be determined whether the plaintiffs presented a viable taking claim or whether instead their claim sounded in tort, in which case jurisdiction would lie in the U.S. District Court instead).

39. Grand Blanc Venture, LLC v. Charter Township of Grand Blanc, 2008 WL 2356366 (Mich.App., June 10, 2008) (unpublished decision) (affirming a trial court judgment in favor of a Michigan township, the Michigan Court of Appeals rejected a claim where a property owner subject to an R&D zoning classification claimed a taking when the township refused to rezone the property to general commercial, ruling that all three of the Penn Central factors weighed in favor of the township on the facts of this case).

40. Lost Trail LLC v. Town of Weston, 2008 WL 3485778 (2d. Cir., Aug. 8, 2008) (unpublished decision) (the U.S. Court of Appeals for the Second Circuit affirmed a Federal District Court's dismissal of a regulatory taking claim based on the finality prong of Williamson County, because plaintiff failed to appeal the city attorney's conclusion that plaintiff's recorded subdivision plat was legally ineffective to the town planning and zoning commission and failed

to appeal an official's rejection of its building permit application to the town zoning board of appeal).

41. Church of Universal Love and Music v. Fayette County, 2008 WL 4006690 (W.D. Pa, Aug. 26, 2008) (in a case involving a County's refusal to grant a rezoning amendment to accommodate a large outdoor religious event, the federal District Court for the Western District of Pennsylvania granted the County's motion for summary judgment on the taking claim because the owner was allowed to use the property "for any approved or zoned purpose except religious purposes," while simultaneously rejecting the county's motion for summary judgment as to the plaintiff's various First Amendment Free Exercise and Religious Land Use and Institutionalized Persons Act ("RLUIPA") claims).

42. Anderson v. Obetz, 2008 WL 3319285 (Ohio App., Aug. 12, 2008) (generally following the findings of a magistrate appointed to hear the case, the Court of Appeals of Ohio rejected a Penn Central taking claim by the owner of a 15-acre residential property based on a rezoning to a "community facilities" designation authorizing only certain government and other institutional uses (but grandfathering plaintiff's existing residential use), ruling that all three of the Penn Central factors weighed against the claim based on the facts of this case).

43. MSI Pillars, Ltd. v. City Commission of Springfield, 2008 WL 4449273 (S.D. Ohio, Sept. 30, 2008) (accepting a magistrate's recommendation, the federal District Court for the Southern District of Ohio dismissed under Williamson County's state compensation prong a section 1983 suit alleging a taking under the Fifth Amendment based on a development moratorium).

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